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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 505.

MANHATTAN PROPERTIES, INC.,
Petitioner,

vs.

IRVING TRUST CO., Trustee in Bankruptcy, etc.,
Respondent.

No. 506.

SAMUEL R. BROWN, et al.,
Petitioners,

vs.

IRVING TRUST CO., Trustee in Bankruptcy, etc.,
Respondent.

PETITION FOR REHEARING.

C. DICKERMAN WILLIAMS,
MORRIS J. BRICKER,
Counsel for Petitioners.

The Hecla Press, 225 Varick Street, N. Y. C. Tel. WAlker 5-1480.

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Supreme Court of the United States

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MANHATTAN PROPERTIES, INC., Petitioner, vs. IRVING TRUST CO., Trustee in Bankruptcy, etc., Respondent.	No. 505.
SAMUEL R. BROWN; *et al.*, Petitioners, vs. IRVING TRUST CO., Trustee in Bankruptcy, etc., Respondent.	No. 506.

PETITION FOR REHEARING.

Your petitioners respectfully submit their petition for a rehearing in the above-entitled case.

The decision of this Court was announced on February 5, 1934. On March 2, 1934, Mr. Justice Roberts made an order extending for sixty days the time within which a petition for rehearing might be filed.

Rehearing Is Sought as to Indemnity Clauses Only.

This case involved two questions: First, are damages generally for loss of future rents provable in bankruptcy? Second, may damages be proved upon the indemnity clauses in the leases before the Court?

Petitioners ask for a rehearing on the first question solely with respect to the second question, viz., that as to the indemnity clauses.

The argument in this Court was devoted principally to the first question, and petitioners respectfully suggest the

possibility that this Court in its attention to the more important issue may have misapprehended the less emphasized questions with respect to the indemnity clauses. This view has been fortified by the action of the Court in denying the petition for certiorari in *Schmidt, Trustee* v. *Lloyd Investment Co.* (*In re National Credit Clothing Co.*) on February 13, 1934. It seems difficult to reconcile that result with the decision in this case in so far as it relates to indemnity clauses. The Circuit Court of Appeals of the Second Circuit has already held in *Irving Trust Co.* v. *Possart* (*In re F. & W. Grand 5-10-25 Cent Stores, Inc.*), not yet reported, that:

> "In our opinion neither the Mullings case nor the National Credit case can survive the Manhattan Properties decision by the Supreme Court."

A copy of that opinion is annexed hereto (Exhibit A). The *Possart* case thus regards the *Manhattan Properties* decision as inconsistent with the result reached in the *National Credit*, or *Schmidt*, case.

Argument.

ANTICIPATORY REPUDIATION OF A COVENANT OF INDEMNITY GIVES RISE TO A RIGHT TO DAMAGES. IT IS NOT NECESSARY TO WAIT UNTIL THE DUTY TO INDEMNIFY HAS MATURED, PETITIONERS SUBMIT.

This Court said (78 L. Ed. 463):

> "Obviously this contract of indemnity is not breached by bankruptcy, and cannot be breached until the duty of indemnifying the landlord arises. That obligation cannot be complete until the expiration of the original term."

The whole theory of the doctrine of anticipatory breach of contract has been that repudiation prior to fruition of an obligation created an immediate right of action to damages. Certainly that theory has been adopted by this Court

(*Roehm* v. *Horst*, 178 U. S. 1). Certainly, also, this Court has applied that theory to bankruptcy, and held that bankruptcy constituted an anticipatory breach warranting proof in the amount of the present damages (*Central Trust Co.* v. *Chicago Auditorium*, 240 U. S. 581).

> "In short it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement" (240 U. S. 591).

Indemnity contracts have been no exception to this rule, either generally or in bankruptcy proceedings. In fact, in a leading case present damages for anticipatory breach of a covenant of indemnity were allowed by a court of law purporting to follow the analogy of bankruptcy.

In *Equitable Trust Company* v. *Western Pacific Railway Company*, 244 Fed. 485, present damages of over $38,000,000 were assessed in an action brought upon a contract to indemnify *seriatim* in future years. The District Court's decision was substantially based upon the assumption that the demand would be provable in bankruptcy. L. Hand, *D. J.*, said (244 Fed. 504):

> "This is obviously the result when the indemnitor becomes insolvent, and it would be a strange rule which favored a frank repudiator over an obligor overtaken by bankruptcy."

Judge Hand discussed the theory of present damages for breach of a covenant of indemnity payable in the future as follows (244 Fed. 504):

> "It is quite true that the creditor gets his discounted future installments now in hand, which is something other than getting the full value later, but that is a necessary concession to some present disposition of the controversy, as near a remedial approximation as the circumstances permit. It is true

> also that the indemnitor's obligation is changed from a series in the future to a gross sum down * * *. Damages sound in remedy and are by no means the equivalent of performance. Were it so, specific performance would be the only possible remedy, and even that not literally such."

The Circuit Court of Appeals affirmed Judge Hand's decision, citing two bankruptcy cases as authority for the procedure, of which one was the *Chicago Auditorium* case, 250 Fed. 327, 339. Certiorari was denied by this Court, 246 U. S. 672.

In *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, this Court held that an obligation on a contract of indemnity was provable, although not mature at the time of the bankruptcy. As the Georgia court said in that case, in language quoted by this Court (236 U. S. 554):

> "* * * At the time the petition in bankruptcy was filed the surety had not sustained or incurred any loss or damage on account of the contractors' default. * * * No judgment fixing the amount of the contractors' liability had been obtained. The only information that the surety could have had on the subject was the claim made by the trustees of the school; and it could not know but that the contractors might have a good defense to the claim, or some part of it; * * *"
>
> *Williams* v. *U. S. Fidelity Co.*, 11 Ga. App. 635, 644.

As a matter of fact, the claim of the surety against the bankrupt was not in the same amount as the demand then made by the school trustees. The trustees then demanded $6,876.08 (Transcript, p. 23), but the surety settled *after* the filing of the petition in bankruptcy for $5,475.36 (ibid. p. 11).

Moreover, this Court has cited with approval the case of *Reading Iron Works—Sweatmen's Appeal*, 150 Penna. St. 369, in which a landlord's claim on what was either a covenant of indemnity or its equivalent was held to be provable in an insolvency proceeding. The *Reading Iron Works* case

was cited by this Court in *Wm. Filene Sons Co.* v. *Weed*, 245 U. S. 597, as authority for the proposition that difference between rental value and rent reserved was a "footing" "familiar and fair" for the liquidation of the landlord's damages.

In the *Iron Works* case, the claimant had let the property to the insolvent Iron Works by a lease under the terms of which

> "the lessor reserved the right to terminate the lease for the breach of any condition or covenant but stipulated that his action in so doing should not relieve the tenant from liability in damages for such a breach" (150 Penna. St. 374).

Upon the insolvency of the Iron Works an assignee for the benefit of creditors was appointed, the lease then having more than eight and one-half years to run. The landlord filed a claim for the present value of his loss. An auditor calculated the difference between the rental value for the remainder of the term and the rent reserved at $40,000.

The Court held the claim should be allowed for that difference, as being the present value of the loss, saying (p. 375):

> "This was in effect an election by the lessor not to stand upon the covenant to pay rent during the remainder of the term, but for the benefit of both lessor and lessee to secure from the abandoned premises all that was practicable, holding the tenant liable in damages only for the actual loss sustained. *The present value of the loss to be sustained for the remainder of the term may be ascertained and the damages liquidated.* This the auditor has done. *For these damages the lessor has a present cause of action, Lothrop* v. *Reed,* 13 Allen, 294, and for that reason a right to share in the fund. The demand is not for rent,* eo nomine, *for under the agreement the lessor has rented the premises to others. It is for the loss he suffers by reason of the difference of the rentals now obtainable*

* *Lothrop* v. *Reed*, 13 Allen, 294 (Mass. 1866), held that in an insolvency proceeding a creditor upon an executor installment contract might prove for the present value of his loss.

in consequence of the peculiar arrangement and construction of the premises, and the rental agreed upon as an inducement to him to make the investment for the use of the company."*

Other cases holding indemnity covenants maturing in the future provable are *In re Buzzini*, 183 Fed. 827 (S. D. N. Y.), and *In re Twentieth Century Millinery Exchange, Inc.*, 41 Fed. (2d) 237 (S. D. N. Y.)—"neither is provability to be denied because payment was by the terms of the agreement to be made in instalments in the future."

THE FACT THAT THE COVENANT IS BROUGHT INTO PLAY BY REENTRY AFTER THE PETITION IS FILED DOES NOT FORBID PROVABILITY.

In *Maynard* v. *Elliott*, 283 U. S. 273, this Court ruled that the requirement of Section 63(a)(1) that certain claims must be "absolutely owing at the time of the filing of the petition in bankruptcy" did not apply to claims on contract under Section 63(a)(4). In that case the liability held provable was that of an endorser on a note not due until over a year after the adjudication in bankruptcy. The opinion is barren of any suggestion that liability accrued until that time. The amount of possible salvage from the maker, or the maker's estate, was, so far as appears, uncertain.

Here liability was fixed as an immediate and direct result of the bankruptcy, an event contemplated by the indemnity clause, and against which the indemnity clause was intended to afford protection. In *Maynard* v. *Elliott* liability was fixed by the default of the maker, which occurred entirely independent of the bankruptcy and not in fact coincident therewith.

The only possible distinction that we can see is in the reference of this Court to the indemnity covenant as a "new contract." Of course, it was a part of the lease—only its

* The lessor at the special instance of the tenant had made certain peculiar changes in the premises. This, rather than an economic depression, was responsible for the decreased rental value of the premises.

applicability was "new." Previously the liability was inchoate.

But logically should not the duty of the obligor not to become insolvent or bankrupt apply just as much to inchoate liabilities as to those then and there outstanding?

And did not the Court so hold in *Maynard* v. *Elliott?* Is not the liability of an endorser equally inchoate until the maker's default, and therefore equally "new" when that default takes place?

THE DECISION, IN SO FAR AS APPLICABLE TO THE INDEMNITY CLAUSE, HAS ALREADY BEEN APPLIED, AND WILL BE APPLIED, TO GIVE AN UNDESIRABLE TECHNICAL ASPECT TO PROVABILITY, PETITIONERS BELIEVE.

After *Maynard* v. *Elliott,* the Circuit Court of Appeals for the Second Circuit held provable damages for breach of lease covenants other than those relating to rent despite the fact that re-entry occurred (as it generally does) after the filing of the petition. *In re Metropolitan Chain Stores, Inc.,* 66 Fed. (2d) 485. There the Court said in part (p. 486):

> "The claim for restoration of property should be allowed on the more liberal theory expressed in Maynard v. Elliott, 283 U. S. 273. The claim is unlike unaccrued rents, and *the very technical and undesirable rule of having the question turn on whether the claim accrued on the day when the petition was filed or a few days later should be avoided.*"

In its recent decision in the *Possart* case, cited *supra,* the Court, under the compulsion of this decision, has overruled its prior holding and adopted the rule previously characterized as "technical and undesirable." It said:

> "The claim for the cost of restoration is grounded on a provision which authorized the lessee to make alterations in the building on the leased premises so as to use it in conjunction with a building on an adjoining lot, 'provided that upon the termination of this lease the Lessee will repair said demised premises so that the same will, upon such termination, be one complete, fully equipped, independent building as now existing.' As already shown, the lease was not terminated prior to the petition in bankruptcy. Hence

at that critical date the implied covenant of the lessee to restore the premises to their former condition upon termination of the lease had not been broken. In the case of In re Metropolitan Chain Stores, Inc., 66 Fed. (2d) 485, this court held a claim based on a similar covenant to be provable on the theory that the filing of the petition in bankruptcy was an anticipatory breach of such covenant. We think this decision cannot stand in the light of the opinion in the Manhattan Properties case. It is there said:

> 'There can be no debt provable in bankruptcy arising out of a contract which becomes effective only at the claimant's option and after the inception of the proceedings, the fulfilment of which is contingent on what may happen from month to month or up to the end of the original term.'

Although the court was referring specifically to covenants of indemnity against loss of future rents, the principle announced seems equally applicable to the present case. The lessee's duty to restore will become absolute only upon termination of the lease, and this is contingent upon the lessor's election to re-enter in the event that existing money defaults are not made good by the lessee within thirty days after the written notice thereof."

Previously the Courts had found it undesirable to forbid proof of obligations which had not fully matured at the time of the filing of the petition. They endeavored to ameliorate the situation by:

1. The "anticipatory breach" theory, which was eventually approved by this Court in the *Chicago Auditorium* case.

2. The "relation back" theory, illustrated by *In re Desnoyers Shoe Co.*, 227 Fed. 401. Under this theory, when the liability accrued under a "bankruptcy clause," a short time after the filing of the petition, the liability was held to "relate back" to the time of the petition.

Maynard v. *Elliott*, 283 U. S. 273, was thought to eliminate the necessity for these devices. In that case the fact that the creditor had the option of maturing the obligation apparently was deemed to support provability.

PETITIONERS SUBMIT THAT, AS THE CIRCUIT COURT OF APPEALS HAS HELD, THE DECISION IN THIS CASE CANNOT BE RECONCILED WITH THE DENIAL OF CERTIORARI IN THE NATIONAL CREDIT CASE. IF THIS BE TRUE, THE COURT MAY WISH TO REMOVE THE INCONSISTENCY.

The Circuit Court of Appeals of the Second Circuit had held in *In re Mullings Clothing Co.*, 238 Fed. 58 (cert. den. 243 U. S. 635), that when a lease had been breached *before* the filing of the petition in bankruptcy, a landlord's claim for loss of future rent was provable. This case was approved and followed by the Circuit Court of Appeals of the Seventh Circuit in *In re National Credit Clothing Co.*, 66 Fed. (2d) 371. This Court denied certiorari *sub nom. Schmidt* v. *Lloyd Investment Co.* on February 13, 1934, eight days after the decision in this case. In the *National Credit* case there was an indemnity clause.

The only possible distinction between this case and the *National Credit* case lies in the fact that the tenant defaulted prior to the petition. But this distinction seems untenable in the light of *Maynard* v. *Elliott* and the language in the opinion in this case that the "contract of indemnity is not breached by bankruptcy, and cannot be breached until the duty of indemnifying the landlord arises. That obligation cannot be complete until the expiration of the original term."

If breach is a prerequisite to provability, and if breach cannot take place until the expiration of the original term, it is difficult to see how the fact that the tenant defaulted a few days before the filing of the petition makes the claim provable when the original term extends many years into the future, as it did in the *National Credit* case.

Presumably for this reason the Circuit Court of Appeals of the Second Circuit in the *Possart* case said:

> "In our opinion neither the Mullings case nor the National Credit case can survive the Manhattan Properties decision by the Supreme Court."

If there is inconsistency, as the Circuit Court of Appeals has held and as petitioners believe, it will be corrected some time, and petitioners ask that an opportunity be given in this case.

TO HOLD THE CLAIMS ON THE INDEMNITY COVENANT PROVABLE WOULD NOT BE INCONSISTENT WITH THE DECISION AS TO FUTURE RENT GENERALLY.

As this Court explained in *Gardiner* v. *Butler & Co.*, 245 U. S. 603, *"in the absence of statute or express contract a lessor who has terminated a lease and evicted the tenant has no further claim against the lessee"* (245 U. S. 605).

In that case—a sequestration suit—proof was allowed upon a lease containing an indemnity clause and not allowed upon a lease not containing such a clause.

As respondents so earnestly emphasized, in the absence of an indemnity clause a landlord has no claim against an evicted solvent tenant.

That principle apparently was the basis of this Court's citation of Co. Litt. 292, b, Sec. 213, in the *Chicago Auditorium* case. That section would have no relation to an indemnity clause.

Accordingly it would be quite consistent to hold that just as a landlord without an indemnity clause may make no claim against an evicted solvent tenant, he may not prove in bankruptcy; but that just as a landlord with an indemnity covenant retains his claim against a solvent tenant, he may prove in bankruptcy.

This result would be consistent with the purpose of the Bankruptcy Act "to relieve the honest debtor from the weight of oppressive indebtedness" (*Maynard* v. *Elliott*, 283 U. S. 273, 277).

If a solvent tenant were not liable, no such relief would be afforded; but the contrary would be true as to indemnity covenants—liability on them would continue to oppress.

Conclusion.

In *Williams* v. *U. S. Fidelity Co.* this Court made susceptibility of liquidation the sole test of the provability of contract claims. There is no difficulty in ascertaining the present value of the indemnity contract—difference between rent reserved and rental value, discounted, is an acceptable standard and one applied in the *Reading Iron Works* case, cited with approval by this Court in the *Filene* case.

The argument in this Court turned largely on the question of the provability of future rents generally. The issue as to the indemnity covenants, as such, was not emphasized. The language of this Court on that subject may not, petitioners submit, be reconciled with other decisions of this Court, and as to the denial of certiorari in the *National Credit* case, the Circuit Court of Appeals has so held in the *Possart* case. Especially it seems inharmonious with this Court's tendency to hold provable liabilities on forward obligations, so as to "relieve the honest debtor."

When the debtor is a corporation the result seems inequitable, as it permits throwing virtually the entire economic loss of the depression suffered by creditors upon the landlords in such cases as the United Cigar bankruptcy, in which creditors with provable claims will receive a 100 per cent. dividend, and a disproportionate amount of the loss upon the landlords in other cases.

A change in the result in so far as the indemnity clauses are concerned would not affect the main principle of the case.

Petitioners therefore ask a rehearing, to be limited to the question of the provability of the indemnity clauses.

Respectfully submitted,

C. DICKERMAN WILLIAMS,
MORRIS J. BRICKER,
Counsel for Petitioners.

April 30, 1934.

Certificate of Counsel.

I certify that this petition is presented in good faith and not for delay.

C. DICKERMAN WILLIAMS.

Exhibit A.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

IN THE MATTER

OF

F. & W. GRAND 5-10-25 CENT STORES, INC.,
Bankrupt.

IRVING TRUST COMPANY, as Trustee,
Petitioner-Appellant,

CORNELIA RIDER POSSART, VIOLA BURDEN, FRANCES R. LEE, VIOLA BURDEN JAMES and GEORGE R. BURDEN,
Appellees,

CORNELIA RIDER POSSART, VIOLA BURDEN, FRANCES R. LEE, VIOLA BURDEN JAMES and GEORGE R. BURDEN,
Claimants-Appellants,

IRVING TRUST COMPANY, as Trustee,
Appellee.

Before:

L. HAND, SWAN and AUGUSTUS N. HAND,
Circuit Judges.

Appeals from the District Court of the United States for the Southern District of New York.

From an order which expunged in part and held provable in part a proof of claim filed in the above entitled bankruptcy proceeding, both the creditor-claimants and the trustee in bankruptcy have appealed. Order modified.

GEORGE S. MITTENDORF, for Creditor-Claimants.
FREDERICK H. WOOD, for Trustee in Bankruptcy.

SWAN, *Circuit Judge:*

The creditor-claimants are owners of premises which they had leased to the bankrupt for a term of 30 years commencing May 1, 1931, at an annual rental of $32,000 payable in equal monthly instalments in advance. Upon a petition filed July 14, 1932, their lessee was adjudicated a bankrupt. The lessors' proof of claim involves two distinct items. One is for loss of future rents in the sum of $117,144.24, being the difference (discounted) between the present rental value of the premises for the remainder of the term and the rent reserved in the lease for the same period; this the referee expunged, and his action the district court affirmed. The other, in the sum of $23,000, is for the estimated cost of restoring the premises, which the lessee had altered, to their former condition; this the referee likewise expunged, but the court held it provable on the authority of In re Metropolitan Chain Stores, 66 F. (2d) 485 (C. C. A. 2). Accordingly this item was remitted to the referee for the taking of proof. From the first part of the court's order, the lessors appealed; from the second part, the trustee in bankruptcy.

The claim for loss of future rents is based upon a covenant in the lease which reads, so far as material, as follows:

> "* * * if the Lessee shall abandon the premises, Lessee shall, nevertheless, continue liable for the payment of the rent and the performance of all other covenants and conditions herein contained. And Lessors shall have the right to take possession of, * * * and relet the premises for the account of Lessee, * * * and the Lessee shall be liable to Lessors for whatever deficiency remains * * *."

It is contended by the lessors that the lessee did abandon the premises prior to the filing date of the bankruptcy petition. In March, 1932, equity receivers were appointed for the lessee in the southern district of New York and shortly thereafter an ancillary equity receiver was appointed in the southern district of California, within which the leased

premises were located. The ancillary receiver occupied the premises and paid the stipulated rent up to June 23, 1932, when he moved out, after having notified the lessors that he would pay no more rent. The trustee in bankruptcy disputes the contention that these facts constituted an abandonment by the lessee prior to its bankruptcy, but if we assume arguendo that they did, we cannot see how the lessors' claim is thereby aided. The provision that despite abandonment "the lessee shall continue liable for payment of the rent," cannot be construed as a covenant by the lessee forthwith to pay all rent reserved for the residue of the term; and if it were, it would be an agreement for a penalty and a claim based thereon would not be provable in bankruptcy. Kothe v. Taylor, 280 U. S. 224. Nor can it be construed as a covenant for liquidated damages to be paid on the event of abandonment, and as such controlled by our decision in the recent case of In re Outfitters Operating Realty Co., Inc., decided February 13, 1934. The provision that the lessors may take possession, relet for the lessee's account and hold the lessee for any deficiency is not applicable, for it does not appear that they have taken possession and relet. Moreover, if it be assumed that they did so after the lessee's bankruptcy, it has now been authoritatively determined that a claim based on such a covenant of indemnity is not provable. Manhattan Properties, Inc. v. Irving Trust Co., U. S. Sup. Ct. February 5, 1934.

This decision we think conclusive against the lessors' claim for damages for loss of future rents. They endeavor to escape from it by reason of the ancillary equity receivership. They urge that appointment of the receiver, or at least a vacation of the premises by him, constituted a repudiation of the lease and a breach of its covenants antedating the lessee's bankruptcy, and on this theory they seek to support the provability of the claim upon the authority of In re National Credit Clothing Co., 66 F. (2d) 371 (C. C. A. 7) and In re Mullings Clothing Co., 238 F. 58 (C. C. A. 2). In the former, the lease was disaffirmed by the lessee's assignee for the benefit of creditors, and on the theory that this terminated the lease and constituted a breach of contract

antedating the petition in bankruptcy, the landlord was held to have a provable claim for damages for loss of future rents. The case was cited by the Supreme Court in its recent opinion in Manhattan Properties v. Irving Trust Co., but in a connection which indicates nothing as to approval of it. Nor can we assume approval from the fact that a petition for certiorari was denied on February 13, 1934. In the Mullings case a contract for a lease to commence in futuro was repudiated before the corporate lessee's bankruptcy by the taking of steps to wind up and dissolve the corporation. The decision has been closely limited to its precise facts. In re Metropolitan Chain Stores, 66 F. (2d) 482, 484 (C. C. A. 2). In our opinion, neither the Mullings case nor the National Credit case can survive the Manhattan Properties decision by the Supreme Court. But, however, this may be, neither would control the case at bar. Here there was no termination, nor accepted repudiation, of the lease prior to the lessee's bankruptcy. On June 28, 1932, the lessors served upon the lessee notice of default in respect to taxes and rent, pursuant to a provision of the lease giving the lessors the right, at their option, to re-enter and terminate the lease should a default in the payment of money due the lessors continue for 30 days after written notice thereof was given to the lessee. Thus the lessors themselves recognized the lease as outstanding and the lessee as having the right to make good its defaults during the 30 days following such notice. Before this time expired bankruptcy occurred. Since the lease was not terminated prior to bankruptcy, the claim under consideration falls squarely within the principle that a landlord may not prove in bankruptcy for loss of rents payable in the future, where his claim is founded upon the tenant's covenant to pay rent, or a covenant to indemnify the landlord against loss of rents for the remainder of the term in the event that he re-enters after the tenant's bankruptcy. Manhattan Properties case, supra.

The claim for the cost of restoration is grounded on a provision which authorized the lessee to make alterations in the building on the leased premises so as to use it in conjunction with a building on an adjoining lot, "provided that

upon the termination of this lease the Lessee will repair said demised premises so that the same will, upon such termination, be one complete, fully equipped, independent building as now existing." As already shown, the lease was not terminated prior to the petition in bankruptcy. Hence at that critical date the implied covenant of the lessee to restore the premises to their former condition upon termination of the lease had not been broken. In the case of In re Metropolitan Chain Stores, Inc., 66 Fed. (2d) 485, this court held a claim based on a similar covenant to be provable on the theory that the filing of the petition in bankruptcy was an anticipatory breach of such covenant. We think this decision cannot stand in the light of the opinion in the Manhattan Properties case. It is there said:

> "There can be no debt provable in bankruptcy arising out of a contract which becomes effective only at the claimant's option and after the inception of the proceedings, the fulfilment of which is contingent on what may happen from month to month or up to the end of the original term."

Although the court was referring specifically to covenants of indemnity against loss of future rents, the principle announced seems equally applicable to the present case. The lessee's duty to restore will become absolute only upon termination of the lease, and this is contingent upon the lessor's election to re-enter in the event that existing money defaults are not made good by the lessee within thirty days after the written notice thereof.

The lease also contained an article entitled "Damage and Destruction Insurance" (not printed in the record) which may well have added further contingencies to the duty to restore. Consequently the claim in question was not provable and should have been expunged. McDonnell v. Woods, 298 F. 434 (C. C. A. 1).

That portion of the order from which the lessors appealed is affirmed, and that portion from which the trustee in bankruptcy appealed is reversed, with directions to expunge from the claim the item for the cost of restoration of the premises to their former condition.